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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1052

LAWRENCE BUCKLEY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Response to Petition for Writ of Certiorari to the Supreme Court of the State of California.

Statement of the Case.

On September 19, 1973, Petitioner, Defendant's attorney of record in the case of *People of the State of California v. Malloy,* Orange County Superior Court Number C-27896, was found to have been guilty of direct contempt of the Orange County Superior Court. On September 20, 1973, after hearing, Petitioner was sentenced to serve five days in the Orange County Jail and to pay a fine of 500 Dollars ($500.00).

Although the court refused to stay the sentence pending review of the matter, it did declare that the sentence would be stayed upon the actual filing of a Petition for Writ of *Habeas Corpus* by the Petitioner.

Petitioner did in fact file such Petition and the Supreme Court of the State of California granted a hear-

ing and ordered Respondent to show cause why the writ should not be granted. After oral argument was had, the Supreme Court of the State of California discharged the order to show cause and denied the Petition for Writ.

This Petition for Writ of Certiorari followed.

Statement of Facts.

The Order of Contempt which is attached to the Petition for *Habeas Corpus* sets forth the following reasons:

> It is hereby found, ordered and adjudged that:
>
> On September 19, 1973, in the immediate presence and view of the Court, during proceedings in the above-entitled action, Lawrence Buckley, counsel for defendant, stated in open court that the Trial Judge "obviously does not want to apply the law", in a colloquy the full portion of which is attached hereto and made a part hereof.
>
> Such statement in effect accused the Trial Judge of lack of integrity, tended to interrupt the due course of the trial then in progress, and constituted contemptuous behavior. . . .
>
> After said contempt, said Lawrence Buckley said he "apologized" and respected the Court's knowledge of the law. Such purported "apology" served only to emphasize the previous attack on the integrity of the Court, which in effect, charged the Court with knowing the law and deliberately refusing to obey it. The transcripts regarding said apology are also attached hereto and made a part hereof. . . .

The Reporter's Transcript of the conversation which preceded the order, the alleged apology, and the actual formal hearing and sentencing on the contempt are attached to the order as though therein fully set forth. Those transcripts show that in the middle of the *Malloy* trial, defense counsel called the district attorney as a witness [R.T. Sept. 19, p. 1]. The trial court, after excusing the jury, asked counsel to make an offer of proof [R.T. Sept. 19, pp. 2, 3, 6, 7]. Subsequently, defense counsel seemed to shift his argument and to wish to ask the district attorney questions under a discovery motion theory rather than wishing to call him as a witness before the jury, as he in fact had done originally [*Cf.* R.T. Sept. 19, pp. 1, 2, 3, 6 and 7 with R.T. Sept. 19, pp. 8 and 9] but he constantly refused to make an offer of proof.

After the court had denied the motion the defense counsel continued to argue with the court [R.T. Sept. 19, pp. 9, 10] so that the judge was forced to repeat itself three times:

THE COURT: Show me a case.

MR. BUCKLEY: I call upon the Court's experience as a judge that everything isn't written down in law books, that new questions arise every day that aren't in the cases.

THE COURT: You don't have authority for it, is that it? It's denied.

MR. BUCKLEY: The District Attorney—

THE COURT: I don't want to hear the argument. It's denied.

MR. BUCKLEY: The District Attorney has none to the contrary. It's consistent with all other—

THE COURT: I've heard enough argument on it.

MR. BUCKLEY: I'll cite to the Court *In re Ferguson*, 5 Cal.3d 25, which talks about the obligation of the District Attorney to turn over to the defense, even without request, all information of a substantial and material nature; says nothing about whether it is written or not. In fact, the Court says there is no need for the defense to make a written notice that will just clog the Court's file with unnecessary paperwork.

That's my case. I rely on that. I'll move the Court for a mistrial.

THE COURT: Denied.

It was immediately after the above exchange that Petitioner made the statement which was held to be contemptuous:

MR. BUCKLEY: This Court obviously doesn't want to apply the law.

THE COURT: Stop insulting me and sit down. Don't tell me I don't want to apply the law. It's grossly insulting and this time I'm going to cite you for contempt. For grossly contemptuous behavior in imputing to this Court a willful desire not to apply the law. It is highly insulting, highly untrue, and you're punished with five days in the Orange County Jail and a fine of five hundred dollars, the sentence to take effect upon the conclusion of this trial. It will be stayed until the verdict is rendered in this case. We'll take a ten-minute recess.

The September transcript shows the alleged apology made by defense counsel to have been preceded by counsel's late arrival because he had been arrested for drunk driving the prior night [*Cf.* R.T. Sept. 20, p. 2,

lines 7-14 *with* R.T. Sept. 20, *People v. Lebhar*, Sept. 20, pp. 7-9]. On the afternoon of the 19th, the court had wanted to reconvene at 1:45 p.m. [R.T. Sept. 20, pp. 2 and 3, R.T. Sept. 20, *People v. Lebhar*, p. 9]. Petitioner had told the court that he had to visit a client at the jail. Just prior to the alleged apology the Petitioner admitted to the court that he had intended to visit the jail but that he had not done so because he was having lunch instead:

> THE COURT: What prevented you from going over there?
>
> MR. BUCKLEY: The time, frankly. Mr. Malloy was going to drive us to lunch, and so he had to come back and get his car, his keys, right across the street, and probably lost about ten minutes in him getting his car, and then by the time I completed lunch it was about twenty after 2:00, twenty-five after 2:00, and I just couldn't get it in that time. Twenty-five after 1:00, I should say.
>
> So I just didn't go. I had every intention, like I say. [R.T. Sept. 20, p. 3].

The alleged apology consisted of the following:

> MR. BUCKLEY: Well, with respect to the comment I made yesterday, I apologize to the Court. That was a comment made perhaps in the heat of anger or combat, and I do apologize, because I do respect this Court and the Court's legal knowledge, and I disagree with the Court, but I don't disrespect it.
>
> THE COURT: I'll see whether that's made in good faith by the manner in which you conduct yourself the remainder of this trial.
>
> MR. BUCKLEY: I'll do my best to support it.

The court's concern over the time wasted because of defense counsel's possible future late appearances as well as prior lateness [R.T. Sept. 20, pp. 4, 5, 6, 7] is best explained by the court statement made in the September 20 *People v. Lebhar* hearing, pages 7-12 where the court points out its own and defense counsel's awareness that the murder trial of *People v. Lebhar* in which defense counsel represented one of the defendants on a murder charge and which was in the middle of a lengthy jury trial temporarily suspended, was to be resumed on September 20, at the time when the *Malloy* case, due to Petitioner's continuous late arrivals and other dilatory tactics was yet unsubmitted to the jury [See R.T. Sept. 20, *People v. Lebhar*].

Questions Presented.

I.

Whether the Record in this Case Shows that Petitioner's Conduct Interrupted or Tended to Interrupt the Judicial Proceedings in Which the Contemptuous Conduct Occurred.

II.

Whether the Refusal of the State Supreme Court to Grant the Petition for Writ of Habeas Corpus Constituted a Denial of Due Process.

III.

Whether the Trial Court Denied Petitioner his Due Process Rights by Adjudicating Him in Contempt.

IV.

Whether the Equal Protection Clause Requires That a Person Found Guilty of Contempt of Court Be Given a Right of Appeal.

ARGUMENT.

I.

California Code of Civil Procedure Section 1209 Does Not Abrogate the Contempt Power of the State Court.

Petitioner argues that he was denied due process because the California Supreme Court held that a determination of whether the proceedings were in fact interrupted by his words and acts was unnecessary because the remark was "contemptuous on its face". This result, Petitioner states, is mandated by California Code of Civil Procedure, section 1209 which *limits* the Court's power to punish for contempt to those cases where the disorderly contemptuous and insolent behavior "tends to interrupt the Court's proceedings".

The argument is untenable since as a matter of state law such a limitation on the Court's power has been declared by the California Supreme Court as being in violation of the "separation of powers" provision of the California Constitution and has thus been voided. As early as 1931, in the case of *Briggs v. Superior Court*, 211 Cal. 619, the California Supreme Court has declared:

> . . . It has been uniformly held that the inherent power of the court or judge thereof to deal summarily with an offender who by tumultuous or offensive conduct or by approbrious or insulting language perpetrated in the immediate view and presence of the court or judge *actually impedes or interferes with the due and orderly administration of justice in a pending cause may not be taken away or materially diminished by legislation.* (Emphasis added).

The same opinion points out that *In re Shortridge*, 99 Cal. 526 declared unconstitutional that portion of the statute requiring the contemptuous statement to be made in such manner as to "actually interfere with its proceedings". The Court states:

> The *Shortridge*, 99 Cal. 526 [37 Am. St. Rep. 78, 21 L. R. A. 755, 34 Pac. 227], which, while a case of constructive contempt, went very far in denying the power of the legislature to interfere materially with the inherent right of the court "to punish as a contempt an act—whether committed in or out of its presence—which tends to impede, embarrass or obstruct the court in the discharge of its duties"; the court stating in conclusion that "The legislative department may regulate the procedure and enlarge the power, but it cannot without trenching upon the constitutional powers of the court . . . fetter the power itself."

The Court goes on to point out that:

> . . . The language of the court above quoted had reference to a then recent legislative attempt to take away from courts altogether the power to punish as a contempt any speech or publication reflecting upon any court or any officer thereof unless the same was "made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings". It was this particular change in the wording of subdivision 13 of section 1209 of the Code of Civil Procedure which the court by its foregoing utterance declared to be beyond the scope of legislative power.

Petitioner seems to agree that the version of 1209 mentioned in the *Shortridge, supra* case was properly held to have been unconstitutional because it would have imposed an "intolerable and impossible burden on the courts" but argues that the California contempt statute as it reads today is "reasonable and should be held to limit the court's power." Petitioner ignores the obvious, namely that the statute insofar as here pertinent is *identical* to the 1891 enactment. The general clause of today's statute in fact still reads:

> No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.

Petitioner must *agree* that the California court *now* as *then* properly determined the statutory limitation on its direct contempt power to be void because unconstitutional.

The right of the state courts and of the federal courts to protect the integrity of their proceedings and to prevent "instances of indecorum" by summary contempt proceedings has never been questioned. The rationale behind this power is best set forth in *Ex Parte Terry,* 128 U.S. 289, 32 L.Ed. 405 (cited with approval in *Groppi v. Leslie,* 404 U.S. 496, 30 L.Ed. 2d 632). There the Court states:

> It is utterly impossible, said Abbott, C. J., in *Rex v. Davison,* 4 Barn. & Ald. 329, 333, "that the law of the land can be properly administered if those who are charged with the duty of administering it have not power to prevent instances

of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public. And a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise."

Finally, Petitioner contends that unless controlled by the limits of the statute the court's contempt power would be so broad as to violate due process. His argument ignores the court's advocated limitation to those cases where the integrity of the court is impugned. In light of the above authorities, Respondent submits that the California Supreme Court acted within the scope of its power and authority in interpreting the California statute to preclude infringement on the court's innate power to punish for contempt of court an attorney who impugns the integrity of the court by a statement made in open court.

II.

The California Statutes Provide That an Attorney Commits a Direct Contempt When He Impugns the Integrity of the Court by Statements Made in Open Court Either Orally or in Writing.

Petitioner argues that he was denied due process because the California court found him in contempt without statutory authority to do so. The Supreme Court, he goes on to argue, refused to determine whether the record showed that Petitioner's verbal action "tended" to disrupt the proceedings and based the contempt on a common law rule thus depriving him of due process because of vagueness and lack of notice.

While it is true that the Supreme Court found it unnecessary to determine whether the Petitioner was con-

temptuous within the meaning of California Code of Civil Procedure, section 1209.1, it did not state that the issue was not covered by any other California statute. The court, in fact, merely pointed out that:

> It is well established that a court has inherent power to punish for contempt of court (*In re McKinney* (1968) 70 Cal.2d 8, 10-11 [73 Cal.Rptr. 580, 447 P.2d 972] and cases there cited). As this court declared many years ago in a case repeatedly cited with approval, this inherent power "is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence." (*In re Shortridge* (1893) 99 Cal. 526, 532 [34 Pac. 227].)

Subsequently, the court went on to *narrow* the issue involved by stating:

> . . . An attorney commits a direct contempt when he impugns the integrity of the court by statements made in open court either orally or in writing.

Although the opinion did not refer to any particular statutory authority in support of its statement, it went on to cite over ten cases decided between 1891 and 1972 in which attorneys were adjudged in contempt because of their insulting statements to a court. This long list of authority clearly shows that an attorney is on notice as to the type of conduct which the California courts are going to consider contemptuous. Those same cases also give a clue as to the Court's interpretation of California Code of Civil Procedure, section 1209. Quite clearly the California Supreme Court recognizes the fact that before a *layman* can be found in contempt his

words or actions before a court *must* "tend" to disrupt the proceedings. Attorneys, however, because they are officers of the court can be found in contempt for reasons which are set forth in another section of California Code of Civil Procedure, section 1209, more precisely California Code of Civil Procedure, section 1209.3, which provides as follows:

> . . . The following acts or omissions in respect to a court of justice or proceeding therein are contempts of the authority of the court:
>
> 3. Misbehavior in office or other willful neglect or *violation of duty by an attorney*, counsel, clerk, sheriff, coroner or other person, appointed or elected to perform a judicial or ministerial service (Emphasis added).

California Business and Professions Code, section 6068 provides in pertinent part:

> It is the duty of an attorney . . . (b) to maintain the respect due to the courts of justice and judicial officers . . . (f) to abstain from all offensive personalities.

Petitioner's conduct, Respondent submits, shows an unequivocal failure to "maintain the respect due to the courts of justice and judicial officers" (Bus. and Prof. Code § 6068, subd. (b). It clearly constitutes disrespect of the court and judge, a violation of Business and Professions Code, section 6068, subdivision (b), and patently reveals a display of "offensive personality", a violation of Business and Professions Code, section 6068, subdivision (f). At the same time it is, *per se*, a failure to maintain respect (Bus. and Prof. Code § 6068, subd. (b)), and an unambiguous display of "offensive personality" (Bus. and Prof. Code, § 6068, subd. (f)).

Such conduct, therefore, is a breach of duty on the part of the attorney and is *per se* contemptuous under California Code of Civil Procedure, section 1209.3.

III.

The Constitution Does Not Preclude a Finding of Contempt in This Case.

As the California court is careful to add, an attorney is free to argue his client's case with great latitude within the limits imposed by the ethics of the profession which impose on him the duty to uphold the integrity of the court. The California Supreme Court opinion states:

> "He has a right to press a legitimate argument and to protect an erroneous ruling." [Citation.] Indeed, so essential is this "fundamental interest of the public in maintaining an independent bar . . ." that "a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to wilful obstruction of the orderly processes." (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 560 [68 Cal.Rptr. 1, 440 P.2d 65], quoting *Gallagher v. Municipal Court, supra,* 31 Cal.2d 784, 788, 795, 796.) When, however, aggressive advocacy gives way to insolence and disrespect towards the court and particularly when it degenerates into 'impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court' (*Hume v. Superior Court, supra,* 17 Cal.2d at p. 513) it is the trial judge's "bounden duty to protect

the integrity of his court." (*In re Friday, supra,* 138 Cal.App. at p. 663; see *Lamberson v. Superior Court, supra,* 151 Cal. at pp. 461-462).

The case of *In re Little,* 404 U.S. 553, 30 L.Ed.2d 708, upon which Petitioner places great reliance is not here applicable for two reasons both of which are set forth by the California Supreme Court. The first reason is that the case involves a layman and *not* an officer of the court. As shown above, the California Supreme Court did not decide whether a tendency to disrupt the proceeding must exist before a lay person can be found in contempt.

The second distinction between the present case and the *Little* case is that in that case the contemptuous statements were made by the layman acting *in propria persona during argument.* Under those circumstances it is indeed difficult to tell where advocacy ends and impropriety begins. And it could also be argued that *during* argument and prior to the court's ruling words should not be considered contemptuous unless they result in an "imminent not merely a likely threat to the administration of justice".

In a situation such as that described in *Little, supra,* and in *Holt v. Virginia,* 381 U.S. 131, 14 L.Ed. 2d 290, that is, where the contemptuous words are uttered by an advocate, whether an attorney or a defendant acting *in propria persona,* during final argument and prior to the court's ruling, the protection of the client's needs must be of paramount importance and the need of the attorney to argue unfettered by the fear of contempt is self evident. After argument is over and the court has ruled, however, the circumstances have changed. The concurring opinion in *Little,* for example, makes clear

that although the defendant was not contemptuous *prior* to the court's final ruling, the words he uttered as he was being removed from the courtroom might well have been contemptuous. Mr. Chief Justice Burger states:

> The North Carolina court is, of course, free to promptly summon this petitioner before it and, observing the strictures of *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed. 2d 532, 91 S.Ct. 499 (1971), issue process requiring him to show cause why he should not be held in contempt for the conduct and utterances following the contempt adjudication.

Since, as the case shows, the possibly contemptuous words were stated *after* the proceeding was over, they obviously could not very well have "tended" to disrupt the proceedings or result in an "imminent threat to the administration of justice." The fact that the concurring opinion in *Little* saw fit to emphasize the state court freedom to institute the above contempt proceedings argues in favor of the California Supreme Court finding that *Little*, the holding of which was carefully limited to the particular facts of that case, was intended to broaden this time-honored rule in order to protect insulting and disrespectful argument that serves no purpose other than to vent an attorney's anger.

Several other decisions of this court which remain as unchallenged authority advocate the same results. Justice Jackson in *Sacher v. United States*, 343 U.S. 1, 9, 96 L.Ed. 717, 723 stated:

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's con-

sidered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. *But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge*—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case. (Emphasis added).

Adverting to the duty of the attorney that same justice at page 726 cautioned:

> . . . That there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.

This Honorable Court in *Fisher v. Pace*, 336 U.S. 155, 93 L.Ed. 569 in approving a summary sentence for contempt under circumstances similar to those in the case at hand adopted and approved the following statement:

> It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument be-

> fore the jury. Of course his rulings thereon were subject to review in the appellate courts, but he has the power to make them right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. *It was the duty of counsel to abide by his decisions even if erroneous;* and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice. (Emphasis added).

The guidelines set forth by the above cases have been reiterated with approval in several recent opinions. In *In re Dellinger*, 461 F.2d 389, 398, for example, the court differentiated between words spoken during argument and words spoken after the court has made its ruling. In rejecting the contention that an attorney has the right to continue arguing after a ruling has been made, the court, citing *Sacher v. United States, supra*, went on to say:

> Although this principle is not without appeal in extreme situations such as *Cooper*, where the judge *sua sponte* recalled a deadlocked jury and gave them his comments on the weight of the evidence without informing counsel of his actions or allowing them an opportunity to register objections, it cannot be accepted as a general principle. If a trial judge prejudicially denies counsel an adequate opportunity to argue a point, appellate courts will reverse, and that alone will deter most judges from arbitrarily cutting off argument.

Thereafter, after stating that an attorney must be given leeway to argue his position, the court concludes:

> However, this is not to say that attorneys may press their positions beyond the court's insistent direction to desist. On the contrary, the necessity for orderly administration of justice compels the view that the judge must have the power to set limits on argument. We simply encourage judges to exercise tolerance in determining those limits and to distinguish carefully between hesitating, begrudging, obedience and open defiance.

Interestingly, 18 U.S.C., Section 401, like the California statute, specifies that a Federal Court has the power to punish as contempt of its authority:

> 1. Misbehavior of *any person* in its presence or so near thereto as to obstruct the administration of justice.
>
> 2. Misbehavior of any of its officers in their official transactions.

Like the California statute the federal statute thus differentiates between laymen and attorneys and court personnel and shows that while obstruction of justice is necessary to render a layman's action or words contemptuous, misbehavior by an officer of the court is contemptuous *per se*. When interpreted in light of the cases cited above, the federal statute *and* the cases clearly show that while the Constitution through its various provisions for a "fair" hearing and "right to counsel" protects the right of a lawyer to argue vigorously on behalf of his client, *it does not* preclude state statutes or state courts from punishing as contempt insulting statements which impugn the court's

integrity and which are made *after* a court's ruling has been made and reiterated.

In the case at hand, the record shows that it was only after the court had repeatedly denied the defense motion and *after* all argument had been completed that the Petitioner made his contemptuous statement, namely that "this court obviously doesn't want to apply the law." (See Opinion 243). This case thus falls within that category of cases where the words are contemptuous *per se* and a finding that the words tend to disrupt the proceedings is not required either by the California law, federal law or the Constitution.

IV.

The Order and the Reporter's Transcripts Which Are an Integral Part of the Order Show That the Judge in the Case at Hand Was Not so "Personally Embroiled" as to Be Unfit to Sit in Judgment on the Contempt Charge.

Petitioner, relying on *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 2d 532, alleges lack of due process. *Mayberry*, however, merely states that in *some instances* there *might* be a denial of due process unless another judge acts on the issue of contempt. That case in fact specifically states:

> Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt

> is committed, but waits until the end of the [400 U.S. 464] trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.

That same case goes on to say:

> The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed.

And as that same court concludes:

> It is, of course, not every attack on a judge that disqualifies him from sitting. In *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed. 2d 921, 84 S.Ct. 841, we ruled that a lawyer's challenge, though "disruptive, recalcitrant and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge [400 U.S. 466] carrying such potential for bias as to require disqualification." Id., at 584, 11 L.Ed. 2d at 928.

In *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed. 2d 921, approved and reaffirmed in the above quoted passage by the *Mayberry* Court, the contempuous words were as follows:

> THE COURT: Proceed, Mr. Scotti.
>
> THE WITNESS: I am not going to answer questions, your Honor. I am not going to testify

in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

THE COURT: You are not only contemptuous but disorderly and insolent.

The Supreme Court held that the words were not such as to disqualify the judge from adjudicating the contempt and stated:

> It is true that Ungar objected strongly to the orders of the court and to its conduct of the trial during his examination. His final outburst, the subject of the contempt, was a flat refusal to answer, when directed by the court, together with an intemperate and strongly worded comment on the propriety of the court's ruling. But we are unwilling to bottom a constitutional rule of disqualification solely upon such disobedience to court orders and criticism of its rulings during the course of a trial. (See *Nilva v. United States*, 352 U.S. 385, 1 L.Ed. 2d 415, 77 S.Ct. 431). We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions. Apparently because Ungar was being required to answer the questions asked rather than some others which he would rather have answered and because he was directed to cease volunteering testimony, Ungar claimed he was being "badgered" and "coerced" and that the court was "surpressing

the evidence." This was disruptive, recalcitrant and disagreeable commentary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.

Petitioner relies on *Mayberry* to support his contention that due process was violated in that he was denied an unbiased judge. His reliance is misplaced. *Mayberry* holds that a judge who has been addressed with "fighting words" such as "direty tyrannical old dog" and "dirty sonofabitch" should not give himself the opportunity to give vent to personal spleen in a judgment of contempt at the end of a trial. *Mayberry* distinguished the kind of case at issue here: "It is of course not every attack on a judge that disqualifies him from sitting. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921, we ruled that a lawyer's challenge, though 'disruptive, recalcitrant, and disagreeable commentary,' was still not 'an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.'"

In the case at hand the conduct of the judge was impeccable. The record shows that time and again the judge showed his objectivity and patience. Thus at page one of the September 19 transcript for example:

MR. BRIAN: Your Honor, just for the record—

THE COURT: Give him a chance. He hasn't explained why he wants to call you.

At page three of that same transcript the court, showing admirable judicial wisdom and restraint allowed himself to be interrupted by Petitioner in mid-sentence:

> THE COURT: I don't believe so, in view of his status in the case. You have an obligation—
>
> MR. BUCKLEY: The Court should let me finish my position so that the record is clear.
>
> THE COURT: I thought you had finished. I didn't know you went on forever.
>
> MR. BUCKLEY: The Court's persistent interruptions—
>
> THE COURT: Don't characterize my conduct as persistent interruptions or I'll cite you for contempt. Get on with your argument.
>
> MR. BUCKLEY: I lost my trail of thought because of the Court's interruption.

That same restraint and equanimity are shown at page five where the court was again rudely interrupted by Petitioner:

> MR. BUCKLEY: Doesn't the record show every witness I have called heretofore has offered relevant testimony?
>
> THE COURT: I have not reviewed the record and am not in a position to answer that question.
>
> MR. BUCKLEY: Perhaps I can number the witnesses for you.
>
> THE COURT: I'm not interested in—
>
> MR. BUCKLEY: I don't call witnesses that won't offer relevant testimony, and this witness will offer relevant and material testimony.
>
> THE COURT: You'll have to first tell me what that is.

At page nine of that same transcript the court again allowed Petitioner considerable latitude when Petitioner refused to accept the ruling of the court and allowed Petitioner to continue arguing after the court had repeated its ruling three times.

On September 20, *after* the finding of contempt the court once more showed leniency when defense counsel showed no *reasonable* excuse either for his lateness or for having forced the court to recess through his representation that he had to see a client at the jail when in fact he had not done so.

In re Grossman, 24 Cal.App.3d 624, 634, strongly implies that a refusal to stop argument might well constitute a contempt. That same case and cases therein cited show that in each of the above mentioned instances the court could have held the attorney in contempt. The mere fact that the court both before and after the finding of contempt showed defense counsel every possible consideration supports the inference that through the course of the *Malloy* trial as well as at the actual hearing on the contempt which was held on the 21st of September *after* the discharge of the jury in the *Malloy* case, the court had retained and did retain its judicial impartiality. Accordingly, it is submitted that the type of words constituting the contempt were not *per se* so inflammatory, and did not in fact so "personally embroil" the judge as to make him unfit to sit in judgment on the contempt charge.

V.

A Petitioner Who Has Sought and Obtained Review of the Matter in the State Court Cannot Be Heard to Complain That He Has Suffered a Denial of Constitutional Rights Because the State Law Does Not Provide Him With the Right of Review by Appeal.

Petitioner herein has endeavored to show himself "convicted" of a "misdemeanor". He has, however, mistaken his status.

In 1924, the California Supreme Court had occasion to distinguish between Code of Civil Procedure provisions (Sections 1209-1222) and Penal Code provision (Section 166), all of which Petitioner herein treats as one. In *In re Morris*, 194 Cal. 63 (1924), the petitioner was convicted pursuant to Penal Code Section 166 and contended it was unconstitutional due to its conflict with the Code of Civil Procedure. The court observed:

> It was the plain intent of the legislature expressed in the cited code sections to give a double aspect to the wrongful acts there enumerated. In one aspect they are to be regarded as offenses against the dignity and authority of the court, remediable in accordance with the rules prescribed in the Code of Civil Procedure. In the other aspect they are to be regarded as offenses against the peace and dignity of the people of the state of California, and remediable as such in accordance with the rules prescribed in the Penal Code.

That Petitioner Buckley herein is *not* convicted of a misdemeanor is made abundantly clear by *In re McKinney*, 70 Cal.2d 8, 13 and 14 where the court states:

> We agree with the Attorney General's concession that the superior court has no jurisdiction to hear and convict the petitioner of the misdemeanor of contempt of court under section 166 of the Penal Code.

Adopting *In re Morris, supra,* the decision in *McKinney* emphasized:

> Plainly the legislature did not intend to take away from the court contemned the power to punish a violator of its orders, but intended rather to provide an additional remedy which should be in a sense cumulative, and which should be available in the courts possessing the appropriate criminal jurisdiction (*In re Morris, supra,* 194 Cal. at pp. 67, 69).

The court expressly recognized those cases holding Penal Code Section 166 to entail a specific criminal proceeding as opposed to "*summary contempts*":

> *People v. Saffell,* 74 Cal.App.2d Supp. 967, 982 (168 P.2d 497), held that a "violation of section 166 of the Penal Code is a misdemeanor and as such it is to be prosecuted in the same manner as other misdemeanors" rather than under the Code of Civil Procedure for summary contempts. The jurisdiction of the justice courts over prosecutions for violation of section 166 was recognized in *In re Bruns,* 15 Cal.App.2d 1, 4 (58 P.2d 1318).

The distinction of "civil" vs. "criminal" contempts has been recently reiterated in *Morelli v. Superior Court,* 1 Cal.3d 328, 333 (1969).

Thus, Petitioner is incorrect in asserting that one "convicted" of contempt has no appeal, for indeed he does *if* prosecuted for the public offense. He is correct, however, that the "final and conclusive" judgment and order provided for in Code of Civil Procedure 1222 does not allow "appeal". The foregoing review of the different natures of the offensive conduct bespeaks the difference in remedy—and the rationale therefore.

Not only is the contempt involved herein not the normal misdemeanor, for example, the severe limitation on sentence prescribed in Code of Civil Procedure Section 1218, but the cases are legion and historic in their concern for immediate punishment where direct contempt is involved. *Ex Parte Terry,* 128 U.S. 289, 307, 32 L.Ed. 405, 410 ("the offender may be *instantly* apprehended and imprisoned at the discretion of the judges"); *Cooke v. U.S.,* 267 U.S. 517, 536, 69 L.Ed. 767, 773 ("Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment constituting due process that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for *immediate* penal vindication of the dignity of the court created it."); *Fisher v. Pace,* 336 U.S. 155, 159, 93 L.Ed. 569, 573 ("Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question.")

It has long been the California law that a writ of review (certiorari) as Petitioner Buckley informed the trial court here in one of his innumerable interruptions [R.T. Sept. 20, 1972, Afternoon Session, p. 8, line 24] is proper to review the jurisdiction of the trial court.

While Code of Civil Procedure 1074 defines the scope of review, it has been interpreted to provide for a review of the entire proceeding:

> When *certiorari* is invoked, the record of the entire proceeding upon which the contempt is based is brought before the reviewing court; but when as here the attack is made by way of *habeas corpus*, and the record of the proceedigs is not produced, the question of jurisdiction must be determined from the judgment itself, and the petitioner is not allowed to go behind the facts and matters recited therein for the purpose of impeaching or contradicting them; they must be taken as true (*In re Hallinan*, 126 Cal.App. 121, 126 (1932). Certiorari invoked, see *Inniss v. Municipal Court*, 62 Cal.2d 487 (1965). See also *In re Lake*, 65 Cal.App. 420).

It is noteworthy that the court contemned herein gave Petitioner all and any record he requested:

> I hereby inform Mr. Buckley that any other proceedings he desires added and made a part of this matter, one way or another, will receive my authorization and consent if he feels any other proceedings should be added to the record in this matter [R.T. Sept. 21, p. 2, lines 16-20].

In this context, it is difficult to see how the state statutory scheme has denied petitioner any protection afforded by law: He was told by the trial judge not only to seek review but to initiate the necessary steps immediately and post only minimal bail. Petitioner's failure to do so reflects not on the trial court or on the

statutory scheme. As stated in *In re Cregler*, 56 Cal.2d 308, 313 (1961):

> The rule is well established, however, that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. (*United States v. Raines* (1960), 362 U.S. 17, 21-22 (80 S.Ct. 519, 512 (3, 4), 4 L.Ed. 2d 524); *People v. Perry* (1931), 212 Cal. 186, 193 (3) (298 P. 19, 76 A.L.R. 1331); *People v. Naumcheff* (1952), 114 Cal.App.2d 278, 280 (1, 2) (250 P.2d 8).) Petitioner has not shown that the statute is being invoked against him in the aspects or under the circumstances which he suggests, and hence may not be heard to complain.

Bell v. Hongisto, 345 F. Supp. 1392, relied on by Petitioner, is not persuasive. Not only was the petition therein denied by this court, but the decision is on appeal and the opinion reflects a rather summary grasp of California's contempt law, failing in particular to regard the State's interest in prompt disposition of summary contempt. The attacks in summary contempt, as in the case at bar especially, strike at the core of the judicial system—here, accusing the judge of not wanting to apply the very law his purpose is to uphold. The courts' supreme power to punish and deter obstreperous conduct in a timely fashion must remain.

Accordingly, and for all the above reasons, Respondent urges this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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